SUPREME COURT OF THE UNITED STATES

No.

KEAL DRIVEWAY COMPANY, a corporation, and R. S. BUNNELL,

Petitioners,

versus

CAR & GENERAL INSURANCE CORPORATION, a corporation,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

It is our contention that the Circuit Court of Appeals in reversing the judgment, upon the sole ground that the District Court erred in refusing to instruct the jury upon the sudden emergency doctrine, declined to follow the applicable Florida law.

I.

THERE WAS NO BASIS, IN THE EVIDENCE, FOR THE APPLICATION OF THE EMERGENCY DOCTRINE UNDER THE FLORIDA LAW

In Hainlin v. Budge, 56 Fla. 342, 47 So. 825, the Florida Court approved an instruction wherein the conditions

under which the rule of sudden peril may be invoked were set forth and in the opinion the court said:

> "We find the requested instruction, which was refused, was taken verbatim from the case of Lincoln Rapid Transit Company v. Nichols, 37 Neb. 332, text 336, 55 N. W. 872, text 873, 20 L.R.A. 853, text 855. The instruction in the cited case was given by the trial judge, and the Supreme Court of Nebraska in a well-reasoned opinion held that no error was committed in giving the same, saying that: 'This instruction told the jury, in effect, that if they found that Mrs. Nichols, while placed in a dangerous situation through the transit company's negligence, *was frightened and in terror, and acted carelessly and was injured*, her conduct under such circumstances was not contributory negligence, as a person in great peril is not required to exercise the care demanded of a careful person under ordinary circumstances.' It is further said in the opinion: *'A choice of evils may often be all that is left to a man, and he is not to blame if he chooses one, nor if he chooses the greater, if he is in circumstances of difficulty and danger at the time and compelled to decide hurriedly'*". (Emphasis ours.)

In White v. Hughes, 139 Fla. 54, 190 So. 446, the Florida Court tersely enunciated the essential factors as (1) suddenness of the peril, (2) an awareness thereof on the part of the plaintiff, (3) action resulting from the impending danger and (4) that the emergency was created by the negligence of the defendant.

An examination of the charges, which were here refused by the District Court (R. 179), will disclose the absence of factors 2, 3, and 4. Quick reference to Campbell's testimony (R. 58 to 63), or the synopsis thereof as set forth in Judge Hutcheson's dissenting opinion (R.

190), will convince the Court that although Campbell was necessarily aware of danger from the oncoming car when it was yet one quarter of a mile away, he took no steps for his own safety and at no time considered himself in peril, nor was his conduct affected by any factor, as his testimony demonstrates that he drove calmly on in his previous pathway, until the accident occurred.

> "This is not a case in which one, placed in a position of danger through the negligence of the company, confused by his surroundings, makes perhaps a mistake in choice as to the way of escape, and is caught in an accident".

Elliott v. Chicago etc. R. Co., 37 L. Ed. 1068, 150 U. S. 245, 14 S. Ct. 85.

II.

AS THE REQUESTED INSTRUCTIONS OMITTED THE ESSENTIAL QUALIFYING PROVISION THAT THE EMERGENCY RULE IS APPLICABLE ONLY IN THE EVENT THE EMERGENCY HAD ARISEN WITHOUT PRIOR NEGLIGENCE ON THE PART OF CAMPBELL, THEY WERE NECESSARILY REFUSED.

In Hainlin v. Budge, supra, the charge which was approved by the Court, set forth the qualifications in the following language:

> "If you believe from the evidence herein that the plaintiff, through the negligence of the defendant, was placed in a situation where she must adopt a perilous alternative, or where, in the terror of an emer-

gency, *for which she was not responsible and for which the defendant was responsible, she acted wildly*" * *. (Emphasis ours.)

In Shell Oil Co., Inc. v. Slade, 133 F. (2d) 518, (opinion February 2, 1943, rehearing denied March 12, 1943) the following statement of the rule was made by the Fifth Circuit Court of Appeals:

> "Nor may appellees rely, as they seek to do, upon the doctrine of sudden emergency both because the evidence establishes without dispute that the deceased had full warning of the dangers in ample time to provide against them and because the defense of sudden emergency is never available where that emergency is the result of the claimant's previous contributory negligence".

The authorities are unanimous in condemning an instruction on the emergency doctrine which fails to charge the jury that the doctrine is applicable only in the event the emergency arose without prior negligence.

See: Carpenter v. Campbell Automobile Co., 140 N.W. 225 (Ia.); Bolton v. Wells, 225 N. W. 791 (N.D.); Dodds v. Gifford, 16 P. (2d) 279 (Cal.); Alaga Coach Line, Inc. v. Foy, 150 So. 493 (Ala.); Prevost v. Smith, 197 So. 905 (La.); Gajewski v. Lightner, 19 A. (2d) 355 (Pa.); Iverson v. Knorr, 298 N.W. 28 (S.D.); Hill v. Walters, 100 P. (2d) 98 (Wyo.); Bybee Bros. v. Imes, 155 S.W. (2d) 482 (Ky.); French v. Nelson, 17 A. (2d) 323 (Vt.); Pickard v. Morris, 13 A. (2d) 609 (N.H.); Ackles v. Lane, 35 P. (2d) 200 (Cal.); Moore v. East St. Louis etc. R. Co., 54 S.W. (2d) 267 (Mo.); Cottrill v. Pinkerton, 248 N.W. 124 (Wis.); Vedder v. Bireley, 267 P. 724 (Cal.) and Landry v. Hubert, 137 A. 97 (Vt.).

III.

THE EVIDENCE ESTABLISHED, AS A MATTER OF LAW, THAT CAMPBELL WAS GUILTY OF CONTRIBUTORY NEGLIGENCE, AND VERDICT SHOULD HAVE BEEN INSTRUCTED.

Campbell's testimony shows that he voluntarily confronted the grave peril of a motor vehicle running at a high rate of speed which he knew was out of control when it was yet one quarter mile away (R. 49) and which he discovered when it was 250 to 300 feet distant was driverless, without taking any steps for his own safety. The evidence discloses that the shoulder of the roadway was of such character (R. 84) as to present a harbor of safety but that Campbell made no effort to avail himself thereof, nor did he reduce his speed but on the contrary, held to his prior pathway, thus plunging "headlong upon a nuisance".

Such conduct was held to preclude recovery under an announcement of the Florida Court made in 1850 in City of Tallahassee v. Fortune, 3 Fla. 19, page 26:

> "Parker, Ch. J., says, in the case of Smith v. Smith, 2 Pick. 624 'to entitle the plaintiff to an action of damages resulting from a nuisance, he must show that he acted with common and ordinary care.' And so we take the law to be; *if a person should go headlong with his beast upon a nuisance, which (with ordinary care) he might have avoided, he ought not to have damages for his loss in consequence of his own recklessness*' ". (Emphasis ours.)

In Lindsay v. Thomas, 128 Fla. 293, 174 So. 418, contributory negligence was thus defined:

> " 'Contributory negligence' is conduct which involves an undue risk of harm to the person who sustains it. A voluntary exposure of oneself to an unreasonable risk is such contributory negligence where a reasonable man in the same position would not so expose himself. American Law Institute, Torts (Negligence), chapter 17, p. 1224 et seq".

See Stanford v. Atlantic Life Insurance Co., 109 F. (2d) 428, wherein the Fifth Circuit Court of Appeals quoted and applied the above definition to preclude recovery.

See also: Clyde Bar, Inc. v. McClamma, ... Fla. ....., 10 So. (2d) 916; Matson v. Tip Top Grocery Co., ... Fla. ....., 9 So. (2d) 366; Tutwiler v. Beverally Nalle Inc., ... Fla. ....., 12 So. (2d) 163; City of Miami v. Saunders, ... Fla. ....., 10 So. (2d) 326; General Outdoor Advertising Co. v. Frost, 76 F. (2d) 127 (5th Cir., Fla.); Baltimore & Potomac R. R. Co. v. Jones, 95 U. S. 439, 24 L. Ed. 506; Elliott v. Chicago, etc. Co., 37 L. Ed. 1068, 150 U. S. 245, 14 S. Ct. 85.

For discussion of identical factual situation, see Iverson v. Knorr, 298 N. W. 28 (S.D.).

IV.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS OF SUCH NATURE AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION IN ORDER TO PREVENT THE INJECTION OF THE ISSUE OF SUDDEN

EMERGENCY IN ALL AUTOMOBILE DAMAGE ACTIONS.

There is but little doubt that most persons who are injured in automobile accidents are confronted with a sudden peril but that fact, in and of itself, does not justify the application of the emergency doctrine.

In the case of Feck's Adm'r. v. Bell Line, Inc., 144 S.W. (2d) 483 (Ky.), the Court in discussing the identical situation here presented said:

> "It is not in every accident case however, that an instruction of the character contended for should be given — —. As a matter of fact it might be said that most persons injured in accidents are confronted with a sudden peril, otherwise, as a rule, there would be no injury since, if the peril were not sudden, the injured party would ordinarily have time to avoid it.

The statement of the court in Kiddle v. Schnitzer, 114 P. (2d) 109 (Ore.), is equally applicable to the instant case:

> "To hold in this instance that the circuit court should have instructed the jury with particular reference to the emergency doctrine would establish a precedent requiring a similar instruction to be given, if requested, in practically every case involving a motor vehicle accident".

We urge this Court to exercise its power of supervision to prevent the serious hindrance in the future administration of the law, in this state, which will follow from the unwarranted precedent established by the decision of the Circuit Court of Appeals. Further, if the judgment be not reversed, the District Judge will be required, at the

re-trial of this action, to instruct the jury on the doctrine of sudden emergency, even though there again be no basis in the evidence warranting such charge.

We respectfully submit for the reasons stated in the petition and this brief, that the application for writ of certiorari should be granted.

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